IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 9180 of 2002

For Approval and Signature:

Hon'ble MR.JUSTICE A.M.KAPADIA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

GOSWAMI KALYANRAIJI GOVINDRAIJI

Versus

GOSWAMI VALLABHRAIJI GOVINDRAIJI

Appearance:

1. Special Civil Application No. 9180 of 2002

MR SB VAKIL SR. ADVOCATE WITH MR AS VAKIL for Petitioners

MR MIHIR THAKORE SR. ADVOCATE WITH MR DEVANG T SHAH for Respondent

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CORAM : MR.JUSTICE A.M.KAPADIA

Date of decision: 21/10/2002

C.A.V. JUDGEMENT

1. In this petition which is filed under Article 227

of the Constitution, petitioners/original defendants seek to challenge judgment and order dated August 7, 2002 rendered by learned 2nd Extra Assistant Judge, Surat in Misc. Civil Appeal No.120 of 2001 by which appeal filed by the respondent/original plaintiff against the petitioners came to be allowed and thereby order dated November 9, 2001 recorded below Ex.5 in Regular Civil Suit No.9 of 2001 disallowing the respondent's application has been set aside and ad-interim injunction as prayed for by the respondent in prayer clause para 11 (1) and (2) of Ex.5 has been granted till final disposal of the suit whereas cross-objections filed by petitioner Nos.1 and 3 at Ex.10 and petitioner No.2 at Ex.11 have been rejected.

2. Petitioner Nos.1, 2 and 3 herein are the original defendant Nos.1, 2 and 3 whereas respondent herein is the original plaintiff in the lower courts and, therefore, for the sake of convenience and brevity, in this petition also, they are referred to as 'the plaintiff' and 'the defendants'.

3. Since the question involved in this petition is relating to succession of the "Pithadhipati" of Surat Pith where the Nidhi Swaroop of Balkrishanji had been consecrated by First Pithadhipati of Nathdwara Shri Gosai Shri Vithaldasji of Vallabh Sampraday (Pushti Marg) which is of considerable importance for the followers and disciples of the said Sampraday, this matter is taken up for hearing and decided finally at the admission stage with the consent of the learned advocates appearing for the parties.

4. Before highlighting the nature of controversy posed for determination in this petition, it would be advantageous to refer the short history of Vallabh Sampraday and its founder late Shrimad Vallabhacharyaji Mahaprabhuji and as to under what circumstances seven other Piths besides the main Pith at Nathdwara originally in Uttar Pradesh, Rajasthan and Gujarat came into existence and also facts of the plaintiff's case as to under what circumstances he is constrained to file the suit.

4.1. The religious sect known as "Vallabh Sampraday" (Pushti Marg) was founded by late Shrimad Vallabhacharyaji Mahaprabhuji, a Telangana Brahmin, having its main or Pradhan Pith at Nathdwara where an idol of Lord Shrinathji was installed in 16th century. The family pedigree of Shrimad Vallabhacharyaji Mahaprabhu (1535-1587) has been narrated in the suit.

Shrimad Vallabhacharyaji Mahaprabhuji had two sons, namely, Shri Gopinathji and Shri Gosaiji Vithalnathji. Shrimad Vallabhacharyaji Mahaprabhuji had bestowed after his heavenly abode, the idol of Shrinathji and of his consort Navnitpriyaji to Shri Vithalnathji who became Pithadhipati of the Pradhanpith at Nathdwara. Shri Vithalnathji had seven sons, namely, Shri Girdharji, Shri Govindraiji, Shri Balkrishanji, Shri Gokulnathji, Shri Raghunathji, Shri Yadunathji and Shri Ghanshyamji. Shri Vithalnathji consecrated seven idols, which were given to his seven sons and they are installed at different piths as follows:

Location of the pith, and House of Gadi	Aadi Pithadhipatis and sons of Gosaiji	Name of the Nidhi Deity
Kota	Girdharji	Mathuradhishji
Nathdwara	Govindraiji	Vithalnathji
Kankroli	Balkrishnaraiji	Dwarkadhishji
Gokul	Gokulnathji	Gokulnathji
Kamvan	Raghunathji	Gokulchandramaji
Surat	Yadunathji	Balkrishnalalji
Kamvan	Ghanshyamji	Madanmohanji

4.2. In this petition we are concerned with the 6th Pith of Surat where Nidhi Swaroop of Lord Balkrishnalalji was bestowed on the Adi first Pithadhipati Shri Yadunathji. It is the say of the plaintiff that the idol of Balkrishnalalji and rights regarding the seva of the said 6th pith at Surat lastly belonged to Shri Goswami Vrajratanlalji Maganlalji Maharaj ('Dadaji' for short) who was grandfather of the plaintiff. It is averred by the plaintiff that Dadaji had executed a will in respect of 6th Pith of Yadunathji and rights of worship were given, jointly in equal shares, to his three grandsons namely, Shri Balkrishnalalji Maharaj, who is the eldest son of Govindraiji, son of Vrajratanlalji, Kalyanraiji who is defendant No.1 and Goswami Vallabhraiji plaintiff himself being the second and third sons respectively of Govindraiji. It is the case of the plaintiff that after demise of Dadaji on 12.10.1995, the worship of Balkrishna

Prabhuji was being performed and carried out by his above mentioned three grandsons and in the same way, rights regarding 6th Pith were also jointly enjoyed by them. The plaintiff's elder brother, Shri Balkrishna Maharaj died on 26.10.2000 and thereafter the dispute arose between the parties.

4.3. It is the case of the plaintiff that defendant No.1, Goswami Kalyanraiji Govindraiji - second grandson of Dadaji, is trying to establish rights of defendant No.2 Goswami Gopeshraiji Balkrishnalalji who is the eldest son of late Shri Balkrishnalalji and defendant No.3 Goswami Mukundraiji Balkrishnalalji, a second son of late Shri Balkrishnalalji. According to the plaintiff, by virtue of the will and Codicil made by late Dadaji the plaintiff has 1/3rd share in 6th Nidhi Swaroop of Lord Balkrishnalalji and in the performing seva and to act as a joint Pithadhipati of 6th Pith at Surat. It is the say of the plaintiff that after death of Shri Balkrishnalalji, defendants are trying to encroach upon his rights in performing Seva and to act as a joint Pithadhipati. It is also the say of the plaintiff that the defendants are trying to act independently performing the Tilak Mahotsav and doing other activities by trying to encroach upon the rights of the plaintiff of his 1/3rd share of the Pithadhipati and therefore he is constrained to file Regular Civil Suit No. 9 of 2001 for declaration and injunction against the defendants.

4.4. In the suit the plaintiff has prayed for the following reliefs:

(i) that it be declared that the defendants do not have any independent/sole right to perform any Tilak ceremony or other activity as the sole Shashthapithadhipati of the Shashthapith at Mota Mandir situated at Chauta Bazar, Surat wherein is placed the Shashthagruhanidhi Shri Balkrishna Prabhuji, i.e., Yadunathji's sixth Gadi, of which the plaintiff and the defendants are jointly the Shashthapithadhipatis;

(ii) that it be declared that the defendants have no independent/sole right to deal with, administer or dispose of or squander away, any movable or immovable properties, ornaments, clothes or any other properties associated with the idol of Shri Balkrishna Prabhuji;

(iii) to permanently restrain the defendants from holding or causing to be held through worshipers, followers or any other person or institution "Tilak Mahotsav" as the sole Shashta Pithadhishwar or from doing any act which would establish the same or from performing or causing to perform seva of the sixth Nidhi of Shri Balkrishna Prabhuji, i.e., the Swaroop (idol) of the sixth Gadi of Yadunathji and of Padukaji Hastakshar, etc., seated with them and from changing or displacing the second Swaroop of Balkrishnaji belonging to the plaintiff's father Shri Govindraiji Vrajratanlalji Maharaj known as Chhota Thakurji, Hastakshar of Mahaprabhuji and Gosaiji belonging to the plaintiff's father and other seven swaroops and

(iv) to permanently restrain the defendants by themselves, their servants, agents or followers from effecting any changes or squandering away the above referred properties and the idol of Shri Balkrishnalalji and the ornaments and clothes of idol;

(v) that the defendants be directed to pay compensatory costs;

(vi) the Honourable Court be pleased to grant such other reliefs as may be considered proper and in the interest of justice".

4.5. The plaintiff filed application Ex.5 alongwith the suit and prayed for interim injunction in terms of paras (iii) and (iv) of the suit.

4.6. The defendants on filing their appearance contested the suit as well as application Ex.5 by filing their written statements and counter affidavits at Ex.55 and Ex.86 wherein inter alia it is stated that Vallabh Sampraday was started by Shri Mahaprabhu Shri Vallabhacharyaji about 500 years ago and as per tenets of Vallabh Sampraday, the right regarding the idols is inherited by the eldest son of eldest branch and the eldest son of the eldest branch is known as the Pithadhishwar of the house of the Vallabh Sampraday and this type of tenets is being followed right from the

beginning and at no point of time the said tenets has been broken. Jurisdiction of the Civil Court is also challenged by contending that this being a question of Hindu tenets, Civil Court has no jurisdiction to decide the issue raised in the case. It is also contended that Late Shri Dadaji had already given up rights of Balkrishnalalji Prabhuji in his life time in favour of his elder son, namely, Govindraiji and this fact is very well known to the plaintiff, even though, in his pleadings, he has suppressed the said material fact before the Court. It is also contended by the defendants that even looking to the pleadings of the plaintiff and on demise of Shri Govindraiji, the said rights were bestowed on his eldest son Balkrishnalalji and on demise of Balkrishnalalji, those rights were bestowed on his eldest son Gopeshraiji, defendant No.2 to the knowledge of the plaintiff and therefore the plaintiff's suit is not maintainable. It is also pleaded that the plaintiff has never challenged the rights of Govindraiji and Balkrishnalalji during the life time of Dadaji and hence the present suit has been filed by the plaintiff after a very long period is not maintainable as the suit is hit by delay, laches, waiver, estoppel and acquiescence. Lastly it is contended that the plaintiff has not followed the order 39 Rule 3 of the Code of Civil Procedure ('the Code' for short) and therefore his application for ad-interim injunction may be rejected with costs and thereby the ad-interim injunction granted at the time of presentation of the suit and application may be vacated.

4.7. After hearing the learned advocates appearing for the parties, considering the averments made in the pleadings and the documents annexed therewith and on the facts and circumstances of the case, the learned Civil Judge (J.D.)., Surat came to the conclusion that the plaintiff has established prima facie case and that the defendants have not been able to establish any custom pleaded by them to the affect that only the eldest son is entitled to be the Shashthapithadhishwar. It is also held that the Will and Codicil are binding to the defendants. It is also held by the learned trial Judge that the plaintiff is entitled to interim injunction as prayed for but only because of the reason that the plaintiff had not complied with the provisions of Order 39 Rule 3 of the Code he is not entitled to interim injunction and accordingly rejected the plaintiff's application for injunction vide order dated 9.11.2001. However, the learned trial Judge has extended the ex-parte ad-interim injunction granted earlier by him to enable the plaintiff to prefer Appeal from Order before

the District Court.

4.8. Aggrieved by the order passed by the learned trial Judge, the plaintiff knocked the door of the District Court by filing Civil Misc. Appeal No.120 of 2001 which was placed for admission hearing before the learned 2nd Extra Assistant Judge, Surat, who, while admitting the appeal, has directed the parties to maintain status quo during the pendency of the appeal as on the date of the suit and initial order passed below application Ex.5 in lower court.

4.9. The learned appellate Judge after hearing the learned advocates appearing for the parties and considering the averments made in the pleadings, documents annexed therewith and the order passed by the learned trial Judge which was impugned before him, came to the conclusion that Civil Court has jurisdiction to try and decide the issue raised in the suit between the parties. It is also held by him that there is no custom in Vallabh Sampraday that the idol is inherited by the eldest son of the eldest branch and he is known as the Pithadhishwar of the house of the Vallabh Sampraday. It is also held by him that the Will and Codicil made by Dadaji are amply proved and by virtue of the said will late Shri Balkrishnalalji, father of defendant Nos.2 and 3, Kalyanraiji, defendant No.1 and Vallabhraiji - the plaintiff became jointly the Pithadhipati of the 6th pith at Surat and the plaintiff has established prima facie case successfully and, therefore, entitled to injunction as prayed for. Resultantly vide order dated August 7, 2002 he allowed the appeal filed by the plaintiff and thereby the order dated November 9, 2001 recorded below application Ex.5 in Regular Civil Suit No. 9 of 2001 by which the plaintiff's application for injunction has been negatived has been quashed and set aside and ad-interim injunction as prayed for by the plaintiff in terms of para 11 (1) and (2) of application Ex.5 is granted till final disposal of the suit whereas cross-objections filed by defendant Nos.1 and 3 at Ex. 10 and by defendant No.2 at Ex.11 have been rejected which has given rise to the present petition at the instance of the defendants.

5. After hearing Mr. S.B. Vakil, learned senior counsel appearing for the defendants at great length and Mr. Mihir Thakore, learned senior counsel appearing for the plaintiff also at great length and on careful and close scrutiny of the impugned judgment and order, I do not find any infirmity with the same and in view of the settled principles of law enunciated by the Supreme Court in catena of decisions with regard to the limited

jurisdictional sweep of the High Court in a petition filed under Article 227 of the Constitution (see Ouseph Mathai v. M. Abdul Khadir, (2002) 2 SCC 319) I would have normally rejected the petition recording a short order but since Mr. Vakil has advanced the arguments at length and elaborately argued all the points and therefore obviously Mr. Mihir Thakore has also replied to the same in great detail and also as the matter relates to the rights of Pithadhipati of Balkrishna Prabhu at 6th Pith at Surat, which is a holy place for followers and disciples of Vallabh Sampraday (Pushti Marg) and as adjudication relating to the succession to Pithadhipati of Sixth Pith at Surat has a far reaching effect at other piths also, I deem it expedient to consider all the contentions advanced before me and answer the same elaborately while rejecting the petition.

6. This is a petition filed under Article 227 of the Constitution. The defendants, therefore, highlighted the pleadings submitted at the trial court, findings recorded by both the courts below, grounds assailing the findings recorded by the appellate court and the history and the origin of Vallabh Sampraday at Shrinathji Temple at Nathdwara in the memo of the petition, on oath, including the scope of the jurisdiction of this Court to interfere with the impugned order. Similarly the plaintiff has also by filing reply affidavit at length denied the averments made in the memo of the petition and asserted how the judgment of the learned 2nd Extra Assistant Judge does not warrant any interference and the scope of judicial review under Article 227 of the Constitution, stated on oath.

7. The petition and the reply affidavits are exhaustively drafted. Therefore, I do not deem it expedient to reproduce the averments made in the petition and reply affidavit in this judgment. However, same shall be referred to in this judgment as and when required.

8. Mr. S.B. Vakil, learned Senior counsel appearing for the defendants has argued the matter at length and exhaustively. The submissions advanced by him can be catalogued as under:

(I) Prior to coming into force in July 2002 the amendment to Section 115 of the Code, the remedy of a person aggrieved by an appellate order of interim relief was a revision application under section 115 of the Code. However, after the amendment of Section 115 of the Code, no revision

application would be competent against such an order. Therefore, the petition filed under Article 227 of the Constitution against the impugned appellate judgment and order of the District Court is not barred on the ground of availability of alternative remedy. In support of the aforesaid contention, Mr. Vakil has relied upon the following decisions:

(i) Achutananda Baidya v. Prafullya Kumar Gayen and others, (1997) 5 SCC 76.

(ii) Baby v. Travancore Devaswom Board, AIR 1999 SC 519.

(iii) Raghunathe Jew at Bhapur v. State of Orissa and others, (1999) 1 SCC 488.

(iv) Industrial Credit and Investment Corporation of India Ltd. v. Grapco Industries Ltd., and others, (1999) 4 SCC 710.

(v) Vadivelu v. Sundaram and others, (2000) 8 SCC 355.

(II) Right which the plaintiff seeks to establish in the suit is a joint right of religious status or character of Pithadhipati (not amounting to an office) and is not a dispute of civil nature as contemplated by section 9 of the Code and therefore since the dispute is outside the purview of Section 9 of the Code, Civil Court has no jurisdiction to decide the same. Notwithstanding this position, the Civil Court has entertained the suit and decided the application Ex.5 which is, per se, erroneous, illegal and void ab initio and therefore this Court must interfere with the impugned judgment and order. The said question of jurisdiction is required to be decided first before going to decide the merits of the application for interim injunction and since the suit is not competent and without jurisdiction, the plaintiff has no prima facie case in the suit. In support of the aforesaid contention, the learned senior counsel relied upon the following decisions:

(i) State of Gujarat v. Mangal Traders, Jamnagar, 1987 (1) GLH 493.

(ii) Sri Sinha Ramanuja Jeer alias Sri Vanamamalai

Ramanuja Jeer Swamigal v. Sri Range Ramanuja Jeer alias Emberumanar Jeer and others, AIR 1961 SC 1720.

(iii) Vathiar Venkatachariar v. P. Ponappa Ayyengar and others, AIR 1919 Madras 1026.

(iv) Advocate-General of Bombay v. Yusuf Ali Ebrahim and others, AIR 1921 Bombay 338.

(v) Vidya Varuthi Thirtha Swamigal v. Baluswami Ayyar and others, AIR 1922 Privy Council 123.

(vi) Chitti Babu Mudaliar v. A. Venkatasubbu Mudaliar and another, AIR 1933 Madras 264.

III. Succession to the status or character of a Pithadhipati to the 6th Pith at Surat.

The succession to the Gadi of the Tilkayat heirs, from the very beginning, being governed by the rule of primogeniture. This succession received recognition from the rulers of Mewar from time to time where the Pradhan Pith is situated. Rule of primogeniture succession to the Gadi is different from and not the same as the rule of primogeniture governing succession to impartible estate. All instances governing succession by rule of primogeniture to an impartible estate have no application to succession under a rule of primogeniture to a religious status and therefore defendant No.2 i.e., eldest son of Balkrishnalalji who was the eldest son of Govindraiji is the Pithadhipati of 6th Pith at Surat and therefore the plaintiff has no right whatsoever to become Pithadhipati of said pith and therefore Vrajratnalalji has no right to make will, Codicil as well as deed of partition of the 6th pith at Surat. In support of the aforesaid contention, the learned senior counsel has relied upon the following decision:

(i) Tilkayat Shri Govindlalji Maharaj, etc., v. State of Rajasthan and others, AIR 1963 SC 1638.

(IV) Besides this, the learned senior counsel has also submitted a written submission contending the same thing. On the aforesaid premises, the learned senior counsel contended that the judgment and order impugned is ex-facie erroneous and deserves to be quashed and set aside by refusing to grant injunction as prayed for by

the plaintiff and therefore the petition deserves to be admitted and allowed.

9. Mr. Mihir Thakore, learned senior counsel appearing for the plaintiff has argued the matter at length and his submissions are elaborate indeed. The submissions advanced by him can be catalogued as under:

(I) Petition under Article 227 of the Constitution cannot be entertained in view of the concurrent finding of facts recorded by both the lower courts and in view of the amendment of Section 115 of the Code there is no need to interfere with the discretion exercised by the lower courts. In support of the aforesaid judgment, the learned senior counsel has placed reliance on the following decision:

(i) Mohd. Yunus v. Mohd. Mustaquim and others, (1983) 4 SCC 566.

(II) It is contended that prior to the amendment of the Code, a person aggrieved by any order in such Misc. Civil Appeal filed under Order 43 Rule 1 (r) of the Code was required to prefer a Civil Revision Application under Section 115 of the Code. In view of the amendment to the Code with effect from July 1, 2002, the scope of Section 115 has been substantially narrowed and now a revision would lie only when the judgment/order, if it had been made in favour of the party applying for the revision would have finally disposed of the suit. Since an order in Misc. Civil Appeal would not dispose of the suit finally, no revision is now maintainable. The mere fact that the power of the court to entertain petition under Article 227 of the Constitution is not circumscribed by any limitations does not imply that the High Court should entertain petitions under Article 227 of the Constitution in respect of orders which were originally revisable, preferably when the legislature has though it fit to narrow down the scope of Section 115 of the Code and has disallowed a revision against such orders, otherwise the very intention of the legislature would be frustrated. The High Court should refrain itself from interfering with orders passed in such Misc. Appeal under Article 227 of the Constitution of India, for by entertaining such petitions the Court is doing something

indirectly which is prohibited by the legislature by amending Section 115 of the Code. In support of the aforesaid contention, the learned Senior counsel relied upon the following unreported decision of this Court (Coram: Jayant Patel, J.):

(i) Patel Prahladbhai Joitaram v. Patel Visabhai Revabhai, in Special Civil Application No. 7741 of 2002, decided on 19.8.2002.

(III) The Nidhi Swaroop of Balkrishnaprabhuji (idol) is considered as property in the Vallabh Sampraday. In the circumstances, it is also accepted practice that one to whom the idol is bestowed, gets the Gadi and accordingly when the Nidhi Swaroop has been bestowed by will on the three grandsons they would jointly become the three Pithadhishwars and the contention of the defendants that Pithadhipati and Pithadhishwar is merely a character or status is not tenable and therefore the contention advanced by the defendants that the suit is not maintainable in view of the bar contained under section 9 of the Code is misconceived.

(IV) Besides this it is also asserted by the learned senior counsel that the post of Pithadhipati is a religious office and associated with it are the emoluments attached to it and is therefore also a property as laid down by the Supreme Court in various decisions. The office of the Pithadhipati, if and only if idol is considered independent entity in Vallabh Sampraday, would be akin to that of a Shebait and such an office is also property in law as laid down by the Supreme Court. Therefore, the claim of the plaintiff in the suit is to the property in the idol or in the alternative to a religious office and is clearly maintainable in a Civil Court under Section 9 of the Code by virtue of Explanation II to the Amendment Act, 1976. In support of the aforesaid contention, the learned senior counsel has placed reliance on the following decisions:

(i) Gopal Lalji v. Girdhar Lalji, AIR 1915 Allahabad 44.

(ii) Most Rev. P.M.A. Metropolitan and others v. Moran Mar Marthoma and another, 1995 Supp. (4) SCC 286.

(iii) Mohan Lalji and another v. Gordhan Lalji Maharaj and others, 40 Indian Appeals 97.

(iv) Nanabhai and four others v. Shriman Goswami Girdhariji, Volume XIL, Bombay Series, Appellate Civil 331.

(v) Shriman Goswami Shri 108 Shri Govardhonlalji Girdharlalji v. Goswami Shri Girdharlalji Govindraiji, Indian Decisions, New Series, 17 Bombay 620.

(vi) Angurbala Mullick v. Debabrata Mullick, AIR 1951 SC 293.

(vii) Ram Rattan v. Bajrang Lal, (1978) 3 SCC 236.

(viii) Shambhu Charan Shukla v. Shri Thakur Ladli Radha Chandra Madan Gopalji Maharaj and another, (1985) 2 SCC 524.

(ix) Commissioner, Hidnu Religious Endowments, Madras v. Shri Lakshmindra Thirtha Swamiar of Shri Shirur Mutt, AIR 1954 SC 282.

(x) Asita Mohan Ghosh v. Nirode Mohan Ghose and others, Indian Appeals Volume XLVII 140.

(xi) Ramanathan Chetti v. Murugappa Chetti, Indian Appeals Volume XXXIII 139.

(V) Rule of Primogeniture as claimed by the defendants was never made applicable to the 6th pith by the 6th Gadi at Surat. Even it was never made applicable to Pradhan Gadi since its inception as the first founder of Vallabh Sampraday Vallabhacharya has given Prathanpith to his second son Vithalnathji Gusainji. Since idol is property and in the alternative the office of Pithadhipati is property, even if there exists any doctrine of primogeniture the same stands abolished in view of Section 4 of Hindu Succession Act ('the Act' for short) and the property would devolve either by intestate succession under the Act or by testamentary disposition.

(VI) Lastly it is contended that joint Pithadhishwarship is permissible as laid down by the Privy Council and Supreme Court and in the

facts of the case there is acceptance of joint Pithadhishwarship between Balkrishnalalji, Kalyanraiji and Vallabhraiji after the heavenly abode of Vrajratanlalji in 1995 till the heavenly abode of Balkrishnalalji and this is clearly accepted in writing executed by Balkrishnalalji as well as is evident from the photographs and it is only on heavenly abode of Balkrishnalalji that the plaintiff was sought to be denied of his right and was constrained to file the suit within three months of heavenly abode of Balkrishnalalji. The position prevailing between 1995 and 2000 is of joint Pithadhishwarship and the plaintiff has a good prima facie case and balance of convenience also tilts in his favour.

(VII) Besides this, the learned senior counsel has also submitted written submissions contending the same thing. On the aforesaid premises, the learned senior counsel urged that there is concurrent finding of facts of both the courts below. The trial court refused injunction on the technical ground, nonetheless with regard to prima facie case finding is recorded by him in favour of the plaintiff and since the challenge made in this petition against the impugned judgment and order lacks merits, the petition deserves to be rejected at the admission stage and he, therefore, urged to reject the petition.

10. I have carefully considered the rival submissions advanced by the learned senior counsel appearing for the parties at the bar. I have also perused the averments made in the memo of petition and the reply affidavit both of them also contain history of origin of Vallabh Sampraday and its pedigree, impugned judgment and order and judgments cited at the bar in support of the contentions raised by both the learned senior counsel appearing for the parties.

11. In order to appreciate the contentions advanced by the learned senior counsel appearing for the parties, certain facts which are not capable of being disputed by either of the parties, are required to be narrated first which have been stated in reply affidavit by the plaintiff and the same have not been controverted by the defendants.

11.1. In Samvat 1535 (1479 A.D.) Vallabhacharya was born. In Samvat 1572 (1516 A.D.) Vithalnathji Gusainji was born. Vallabhacharyaji bestowed the idols of Lord

Shrinathji, Navnitpriyaji and seven other idols on his younger son Vithalnathji Gusainji and not on his elder son Gopinathji or his eldest son's son Purshottamji (Source: Para 12.1 of the affidavit in reply). Shri Vithalnathji Gusainji had seven sons, namely, Shri Girdharji, Shri Govindraiji, Shri Balkrishanji, Shri Gokulnathji, Shri Raghunathji, Shri Yadunathji and Shri Ghanshyamji. Shri Vithalnathji Gusainji during his life time, in a partition effected between himself and his sons, retained the idols of Shrinathji and Navnitpriyaji while the seven other idols went to his seven sons, the sixth idol of Balkrishanji going to the sixth son Yadunathji which is the sixth Gadi at Surat (Source: Para 12.2 of the affidavit in reply).

11.2. In Samvat 1642 (1586 A.D.) on heavenly abode of Vithalnathji Gusainji, by mutual understanding amongst the brothers, Shrinathji and Navnitpriyaji went to eldest son Girdharji who was also having the idol of Mathuradishji. Thus he had three idols, Shrinathji, Navnitpriyaji and Mathuradishji (Source: Para 12.3 of the affidavit in reply).

11.3. Shri Girdharji bestowed the idol of Shrinathji and Navnitpriyaji to his elder son Damodarji, while the idol of Mathuradishji was bestowed on his younger son Gopinathji Dixitji. Thus, eldest son Damodarji did not get all the idols and he only became Pradhan Pithadhishwar but not the Pratham Pithadhishwar which went to the younger son (Source: Para 12.3 of the affidavit in reply).

11.4. In Samvat 1972 (1916 A.D.) a letter was addressed by the Goswamis, Goswamini and Gokulastha Bhatt Varge to Vrajratanlalji Maharaj stating inter alia that the one to whom is bestowed the idol (Shreeji) of the particular Swaroop is Tilkayat of that house (Copy of the letter is produced at mark 87/1 in the lower court and annexed in this petition vide Annexure A alongwith Gujarati translation).

11.5. In Aso Vad Amas, Samvat 2012 (2.11.1956) a written understanding was arrived at between Vrajratanlalji Maharaj, his wife Champaklata Vahuji, his eldest son Govindraiji and his younger son Madhusudanlalji which recorded partition of property in Samvat 2012 and then proceeded to record how the idols and the properties associated therewith are to be partitioned. It is recorded that the seva of Shri Balkrishnalalji would be done by Shri Vrajratanlalji Maharaj so long as he wishes and after his heavenly abode

or at any time he wishes, it would be given to his elder son Shri Govindraiji as absolute owner and the new idol consecrated would be given to his younger son Shri Madhusudanlalji absolutely and the respective sevas of the two idols would be performed by the two sons respectively. It was further agreed that in the event new idol is not consecrated and bestowed on Shri Madhusudanlalji then the rights of seva of Shri Balkrishnalalji would be jointly held by his two sons Govindraiji and Madhusudanlalji but would be performed as per age (Refer the will Annexure 'C' to the affidavit in reply - page Nos.126 to 130).

11.6. On 14.10.1974 the eldest son of Vrajratanlalji, that is, Govindraiji who happened to be the father of the plaintiff, defendant No.1 and Balkrishnalalji (father of defendant Nos.2 and 3) expired.

11.7. On 25.11.1986 Vrajratanlalji Maharaj executed his last will and testament under which he bestowed the idol of Shri Balkrishnalalji and the sixth Gadi of Yadunathji alongwith rights of seva as and by way of ownership rights to his three grandsons, Balkrishnalalji i.e., the father of defendant Nos.2 and 3, Kalyanraiji (defendant No.1) and Vallabhraiji (plaintiff) and when the elder amongst them is present as per the prevailing custom, he should be permitted to do the main seva (Refer Annexure 'C' to the affidavit in reply - page 131).

11.8. On 11.8.1985 Codicil was executed by Vrajratanlalji Maharaj which reasserted the joint devolution of the sixth Gadi at Surat to the three grandsons with equal rights (Refer Annexure 'D' to the affidavit in reply - page 138).

11.9. On 12.10.1995 Vrajratanlalji Maharaj went to heavenly abode.

11.10. Statement of Shri Balkrishnalalji Maharaj was recorded on 14.12.1995 before City Survey Officer accepting that the names of three brothers be mutated in the records. Statements of the witnesses of the will and codicil were also recorded on the same day before City Survey Officer accepting that the names of three brothers be mutated in the records (Refer Annexures 'F' and 'G' to the affidavit in reply - page Nos.146 - 148).

11.11. On a stamp paper of Rs. 20/- a document is prepared on 8.2.1997 which is signed by the eldest grandson of Vrajratanlalji through Govindraiji i.e., Shri Balksirhnalalji, the father of defendant Nos.2 and 3. It

is a clear admission by Shri Balkrishnalalji that the sixth Gadi after the heavenly abode of Vrajratanlalji Maharaj is jointly owned by Shri Balkrishnalalji, Shri Kalyanraiji and Shri Vallabhraiji. Similarly, the Padukaji of Shri Yadunathji also jointly belonged to the three brothers with joint rights of seva and all income and expenses are also to be shared equally (Refer Annexure 'E' to the affidavit in reply at page Nos.141 to 145).

11.12. In the year 1998 photographs of the function held at Surat Haveli were produced with list Ex. 87/8 showing Shri Balkrishnalalji and Shri Vallabhraiji (plaintiff) seated as well as Shri Gopeshraiji, the son of Balkrishnalalji also seated. The Board in Hindi, in the Haveli, reads:

"Jagat Guru Shri Vallabhacharya Shashthapith
Adhipati (Malik)
Goswami Shri Balkrishnalalji Govindraiji Maharaj
Gowarmi Shri Kalyanraiji Govindraiji Maharaj
Gowarmi Shri Vallabhraiji Govindraiji Maharaj"

This clearly shows the ownership of the pith having been accepted during the lifetime of Balkrishnalalji.

11.13. Shri Balkrishnalalji went to heavenly abode on 26.10.2000. Kalyanraiji, Gopeshraiji and Mukundraiji, the defendants in the suit, started contesting the plaintiff's right to act as joint Pithadhipati and claimed that on the doctrine of Primogeniture, the Gadi and the idol would only go the eldest son of Balkrishnalalji, namely, Gopeshraiji, defendant No.2.

11.14. On 6.1.2001 Vallabhraiji filed Regular Civil Suit No. 9 of 2001 praying for the reliefs to which reference is made in earlier paragraphs of this judgment.

11.15. On 6.1.2001 an application for interim injunction was moved. Ex-parte ad-interim injunction was granted in the following terms:

"Read the application. Heard the plaintiff's advocate and perused the documentary evidence produced alongwith the suit. In the interest of justice, ad interim injunction is granted against the defendants of para 11 (1) and (2) of this application upto 12.1.2001. Issue show cause notice to the defendants on payment of process fees returnable on 12.1.2001."

11.16. On 12.1.2001 the plaintiff did not supply to the

defendants the affidavit of Natvarlal Mashruvala when serving the ex-parte injunction and the mandatory provisions of O.39 R.3 of the Code are accordingly not complied with and the defendants moved an application, Ex.19 for vacation of interim relief. It is pertinent to highlight the fact that the said affidavit was given to the defendants on 12.1.2001 at 5.00 P.M. This application was ordered to be heard with the application Ex.5.

11.17. On 9.11.2001 the Civil Judge (J.D.) dismissed the application for injunction solely on the ground of noncompliance of O.39 R.3 of the Code while holding that the plaintiff has a prima facie case and if injunction is not granted, the plaintiff would suffer irreparable loss which cannot be compensated in terms of money and vacated the ex-parte injunction. The said ex-parte injunction, however, was extended to enable the parties to approach the Appellate Court.

11.18. Being aggrieved by the above order, Misc. Civil Appeal No.120 of 2001 was preferred before the Extra Assistant Judge, Surat by the plaintiff. On 21.11.2001 the learned 2nd Extra Assistant Judge ordered to maintain status quo of the disputed issue as on the date of the initial order passed below Ex.5.

11.19. On 7.8.2002 Misc. Civil Appeal is allowed. Injunction prayed as prayed for in terms of para 11 (1) and 11 (2) of the application Ex.5 is granted till final disposal of the suit.

12. Now having adverted the undisputed facts as above, let us examine as to whether the dispute raised by the plaintiff in the suit is maintainable in a civil Court under Section 9 of the Code.

13. According to the defendants, right which the plaintiff seeks to establish in the suit is a joint right of religious status or character (not amounting to an office) and is not a dispute of civil nature as contemplated by Section 9 of the Code. In support of this contention, reliance is placed to the judgment of the Supreme Court in Shri Sinha Ramanuja's case (supra) to contend that post 'Pithadhipati' indicates religious status or character, but not office, which involves performance of religious ceremonies such as seva and for nonobservance of such performance they are not visited with any penalty and in these circumstances suit is not maintainable under Section 9 of the Code.

14. Reliance placed on the above referred to judgment is completely misplaced because the facts of that case are different from the facts of this case and in the facts of the present case the said judgment is not applicable. In order to appreciate the said decision, certain facts of that case are relevant which are as under:

In the said case, litigation involved the claims of the manager of the temple known as Emberumanar Temple and of heads of certain Mutts, namely, Vanamamalai Mutt, Ahobilam Mutt and Tirukkurungudi Mutt as regards the order of priority in which certain Honours have to be distributed amongst them when they attend the temple of Shri Athinathalwar for worship. It is observed that in the Ghoshties (group of worshippers in front of the deity) in Shri Athinathalwar Temple both on ordinary and special days, the said managers and heads are shown Honours befitting their rank. The Honours consist of distribution of Thulasi, Safari and Viniyogam and a few more similar items and each of them is allotted a particular place in the Ghoshties and certain order of precedence is observed inter se between them. The order of precedence in the matter of receiving Honours had become an unending source of bickering between the religious heads, with the result, the Religious Endowment Board interfered to settle the dispute between them. It appears that by order dated 15.5.1935, the Board altered the order of precedence giving the head of Vanamamalai Mutt precedence over the manager of Emberumanar Temple and this led to the filing of a suit. This and other suits culminated in the decision of the Supreme Court. It is in this context that the Supreme Court came to the conclusion that the manager of Emberumanar Temple was not holding any office in Athinathalwar Temple and was merely honoured in the Athinathalwar temple. The facts clearly establish that the two temples, namely, the Emberumanar Temple and the Athinathalwar Temple are different legal entities and the manager of the Emberumanar Temple does not become the office holder of the Athinathalwar Temple. In the circumstances, the Supreme Court came to the conclusion that even if Tirtham is given or other Honours are shown to a person holding an office in another temple and not in that temple, it does not necessarily follow that the said Honours are part of the remuneration attached to the office. In the light of the aforesaid acts, the Supreme Court came to the conclusion that the suit was not of a civil nature and was not maintainable under Section 9 of the Code.

15. The said judgment would have no applicability to

the facts of the present case where the suit is directly related to a religious office to which is attached, emoluments, remuneration and perquisites in the form of Charanbhet and Gurubhet. In fact emphasis is placed on one line, namely, "the essential condition for the existence of an office is that the holder of the alleged office shall be under a legal obligation to discharge the duties attached to the said office and for the nonobservance of which he may be visited with penalties" by the defendants is unwarranted for the requirement of penalty is not a sine qua non for an office and since emoluments and perquisites are attached to this office and the office is in respect of the very temple irrespective of whether penalty could be imposed or not it would still be a religious office.

16. If the Nidhi Swaroop itself is not considered as property, then all the properties are deemed to be associated with the Nidhi Swaroop while the post of a Pithadhipati is a religious office performing certain duties to the Nidhi Swaroop and the post is akin to the post of a Mahant or a Shebait. A pithadhipati is not only the head of the Pith and performs seva and puja of Lord Krishna but is also accepted by the followers as Acharya. A Pithadhipati has to perform the diurnal rights for the idol worshipped by the sect. He has to wash dress and perform Arti before the image. The food offerings placed before the idols are distributed amongst the Vaishnav followers by him. These rituals are performed with meticulous care from day to day and which are prescribed as items of seva is a duty attached to the office of the Pithadhipati.

17. A Pithadhipati is entitled to initiate members by performance of two rights known as "Sharanamant Opadesh" and "Atmanivedan". The Nidhi swaroops are placed in Haveli occupied by the Pithadhipati and the followers of Vallabha attend the worship and services of the Nidhi Swaroop from the day to day in the belief that such devotional conduct would ultimately lead to their salvation. The religious practices of Vallabh sect are centered around the doctrine of Bhakti which are performed in the Haveli which is the residence of the Pithadhipati. A Pithadhipati has, therefore, duties to perform.

18. In view of his position and the office as Pithadhipati, is offered Charanbhet and Gurubhet which are clearly attached to the office.

19. The essential condition of becoming a

Pithadhipati is that he shall be under an obligation of performing the above duties attached to the said office. The devotees would be attending the seva which would be performed by him. For instance, if a Pithadhipati or a Tilkayat renounces the Hindu religion and converts himself to Islam or any other religion but still insists on continuing on the post of Pithadhipati, certainly the devotees and the members of the family of the Gosainkul would be entitled to depose him from the post of Pithadhipati. Nonobservance of duties as Pithadhipati can be visited with penalties, either by the devotees or the family members or through the State which is the custodia legis of all religious temples and places. While it is true that the idol of Balkrishnalalji, the Sixth Pith and Haveli at Surat are private properties, there is certainly a public flavour involved, since there is a huge following of devout Vaishnavas and, in the circumstances, there certainly is a public element involved.

20. In this connection, it is interesting to observe from the decision of the Supreme Court in Tilkayat Shri Govindlalji's case (supra) that on two occasions, the Tilkayat of Shrinathji was deposed by the then ruler of Udaipur. In one case the Rana of Udaipur deposed the Tilkayat before the Firman while in other by issuing Firman. This fact itself indicates - (i) that the State can always act as custodia legis in respect of religious temples and places and (ii) that the Tilkayat of Nathdwara Temple was visited with penalties imposed by the State. The incidents which are described in the said judgment are as under:

(i) It appears that in 1813, Tilkayat Govindlalji was adopted by the widow of Tilkayat Damodarji and the ruler of Mewad recognized the said adoption. Later the relation between the ruler of Mewad and the Tilkayat was strained during the time of Tilkayat Girdarlalji. It seems that the Tilkayat was not contend with the position of a spiritual leader of the denomination, but he began to claim special secular rights and when the Darbar of Udaipur placed the villages belonging to the Nathdwara Temple under attachment, a protest was made by the members of the denomination on behalf of the Tilkayat. It was a result of the strained relationship between the Darbar and the Tilkayat that in 1876, Tilkayat

Girdarlalji was deposed and was deported from Nathdwara by Rana of Mewad on May 8, 1876 and in his place his son Gordhanlalji was appointed at Tilkayat.

(ii) Unfortunately in 1933 another occasion arose when the Rana of Udaipur had to take drastic action after the death of Gordhanlalji on September 21, 1933, his grandson Damodarlalji became the Tilkayat. His conduct however showed that he did not deserve to be a spiritual leader of a denomination and could not be left in charge of the religious affairs of the Shrinathji temple. That is why on October 10, 1933, he was deposed and his son Govindlalji, the present Tilkayat was appointed. Before adopting this course, the Rana had given ample opportunity to Damodarlalji to improve his conduct but despite the promises made by him, Damodarlalji persisted in the course of behaviour which he had adopted and so that Darbar was left with no other alternative but to depose him."

21. The aforesaid facts clearly disclose that the Tilkayat or a Pithadhipati could be visited with penalty.

22. In view of the above, the requisites of the office laid down in the decision of the Supreme Court in Shri Sinha Ramanuja's case (supra) relied upon by the defendants are fully complied with in the instant case and the claim of the plaintiff to protect his right of joint Pithadhishwar is clearly of civil nature.

23. In the Gopal Lalji's case (supra), Allahabad High Court has observed that "after considering the evidence we think there can be no doubt that these sects (i.e., the Vallabhacharya sect) always regarded themselves as having specific interest capable of being partitioned in the property held by them including even in the temple and idol". Relying upon the aforesaid judgment Mr. Thakore, learned senior counsel for the plaintiff contended that Swaroop, Nidhi and Gadi have specific meanings - Nidhi means 'wealth' or 'property' or 'bhandar'. The meaning of Nidhi Swaroop and Gadi is given in the Bhagwad Gomandal and it is also accepted practice that one to whom the idol is bestowed, gets the Gadi and accordingly when the Nidhi Swaroop has been bestowed by will on the three grandsons they would

jointly become the three Pithadhishwars and the contention of the defendants that Pithadhipati and Pithadhishwar is merely a character or status, is not tenable. The claim is in respect of the idol which is the property and is maintainable in Civil Court and consequently the claim to the Gadi is also maintainable in Civil Court. According to me, this submission of Mr. Thakore has much substance and force. Therefore, when the Nidhi Swaroop has been bestowed by will on the three grandsons they jointly became the three Pithadhishwars and the contention of the defendants that Pithadhipati and Pithadhishwar is merely a character or status is not tenable. The claim is in respect of the idol which is property and is maintainable in Civil Court and consequently the claim to the Gadi is also maintainable in Civil Court.

24. There was a conflict of view prevailing amongst the different High Courts as regards the office to which no fees were attached and the view taken by some High Courts was that it was not an office within the purview of section 9 of the Code and a suit in respect of it was not maintainable. This controversy is laid to rest by the amendment of the Code by Amendment Act of 1976 whereby Section 9 of the Code was amended by addition of Explanation II. The amended Section 9 reads as follows:

"Section 9. Courts to try all civil suits unless barred -- The Court shall subject to the provisions herein contained have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred.

Explanation I -
A suit in which the right to property or to an office is contested is a suit of a civil nature, notwithstanding that such right may depend entirely on the decision of questions as to religious rites or ceremonies.

Explanation II -
For the purposes of this section, it is immaterial whether or not any fees are attached to the office recorded to in Explanation I or whether or not such office is attached to a particular place."

25. After the amendment of Section 9 of the Code, the Supreme Court has recently delivered a judgment explaining the expansive scope of Section 9 of the Code

in Most Rev. P.M.A. Metropolitan's case (supra), the relevant extracts whereof are as under:

"28. One of the basic principles of law is that every right has a remedy. Ubi jus ibi remediem is the well-known maxim. Every civil suit is cognizable unless it is barred, "there is an inherent right in every person to bring a suit of a civil nature and unless the suit is barred by statute one may, at one's peril, bring a suit of one's choice. It is no answer to a suit, howsoever frivolous the claim, that the law confers no such right to sue" Ganga Bai v. Vijay Kumar ((1974) 2 SCC 393 : AIR 1974 SC 1126). The expansive nature of the section is demonstrated by use of phraseology both positive and negative. The earlier part opens the door widely and latter bars entry to only those which are expressly or impliedly barred. The two explanations, one existing from inception and latter added in 1976 bring out clearly the legislative intention of extending operation of the section to such religious matters where right to property or office is involved irrespective of whether any fee is attached to the office or not. The language used is simple but explicit and clear. It is structured on the basic principle of a civilized jurisprudence that absence of machinery for enforcement of right renders it nugatory. The heading which is normally key to the section brings out unequivocally that all civil suits are cognizable unless barred. What is meant by it is explained further by widening the ambit of the section by use of the word 'shall' and the expression "all suits of a civil nature" unless "expressly or impliedly barred".

29. Each word and expression casts an obligation on the court to exercise jurisdiction for enforcement of right. The word 'shall' makes it mandatory. No court can refuse to entertain a suit if it is of description mentioned in the section. That is amplified by use of expression "all suits of civil nature". The word 'civil' according to dictionary means "relating to the citizen as an individual; civil rights". In Black's Law Dictionary it is defined as "relating to private rights and remedies sought by civil actions as contrasted with criminal proceedings". In law it is understood as an antonym of criminal. Historically the two broad

classifications were civil and criminal. Revenue, tax and company etc., were added to it later. But they too pertain to the larger family of 'civil'. There is thus no doubt about the width of the word 'civil'. Its width has been stretched further by using the word 'nature' along with it. That is even those suits are cognizable which are not only civil but are even of civil nature.... The word 'nature' has been defined as "the fundamental qualities of a person or thing; identity or essential character; sort; kind; character". It is thus wider in content. The word 'civil nature' is wider than the word "civil proceeding". The section would, therefore, be available in every case where the dispute has the characteristic of affecting one's rights which are not only civil but of civil nature.

30. Are religious rights, for instance right to worship in a religious place, entry in a temple, administration or religious shrines for instance a temple, mosque or a church are rights of civil nature? Is the suit filed by the respondent bad as the declaration, injunction and prohibition sought are in respect of matters which are not civil in nature? The answer is given by Explanation I. The Civil Procedure Code was enacted during British period. The legislature enacting the law was aware that there were no ecclesiastical courts either in ancient or medieval India as in England..... There are numerous authorities where dispute about entry in the temple, right to worship, performing certain rituals have been taken cognizance of and decided by civil courts. In Narasimma Chariar v. Kristna Tata Chariar ((1870-71) 6 Mad HCR 449) it was claimed by the plaintiff that they had the exclusive rights to Adhyapaka Mirass of reciting certain texts or chants in a temple. In that suit it was held:

"The claim is for a specific pecuniary benefit to which plaintiffs declare themselves entitled on condition of reciting certain hymns.

There can exist no doubt that the right to such benefits is a question which the courts aware bound to entertain, and cannot cease to be such a question, because claimed on account of some

service connected with religion.

If, to determine the right to such pecuniary benefit, it becomes necessary to determine incidentally the right to perform certain religious services, we know of no principle which would exonerate the court from considering and deciding the point."

It was approved by the Privy Council in Krishnama v. Krishnasami (ILR (1879) 2 Mad 62 : 6 IA 120) and the passage extracted above was approved by observing that it was "perfectly correct". This was a decision when Explanation II was not there. The dispute had two rounds of litigation. In the second round after remand the High Court observed:

"It is certainly not the duty of the civil court to pronounce on the truth of religious tenets nor to regulate religious ceremony; but, in protecting persons in the enjoyment of a certain status or property, it may incidentally become the duty of the civil court to determine what are the accepted tenets of the followers of a creed and what is the usage they have accepted as established for the regulation of their rights inter se."

33. On the plain phraseology of the section, therefore, it is clear that a suit filed after coming into force of the Constitution for vindication of rights related to worship, status, office or property is maintainable in civil court and it would be duty of the court to decide even purely religious questions if they have a material bearing on the right alleged in the plaint regarding worship, status or office or property. In Nafar Chandra Chaterjee v. Kailash Chandra Mondal (AIR 1921 Cal 328 : 25 CWN 201) it was held:

"Where there were no Ecclesiastical Courts, there was nothing to prevent civil courts from holding that Pujari has been moved from his office on valid grounds."

Sir Ashutosh Mookerjee quoted thus:

"There is manifestly nothing wrong in principle that the holder of a spiritual office should be subject to discipline and should be liable to deprivation for what may be called misconduct from an ecclesiastical point of view or for flagrant and continued neglect of duty..... It is plain that although, so far as Hindus are concerned, there is now no State Church and no Ecclesiastical Court, there is nothing to prevent civil courts from determining questions such as those raised in the present litigation and from holding that the Pujari has been removed from his office on valid grounds."

38. "Religion is the belief which binds spiritual nature of men to supernatural being". It includes worship, belief, faith, devotion, etc., and extends to rituals. Religious right is the right of a person believing in a particular faith to practise it, breach it and profess it. It is civil in nature. The dispute about the religious office is a civil dispute as it involves disputes relating to rights which may be religious in nature but are civil in consequence. Civil wrong is explained by Salmond as a private wrong. He has extracted Blackstone who has described private wrongs as "infringement or privation of the private or civil rights belonging to individuals, considered as individuals, and are thereupon frequently termed civil injuries". Any infringement with a right as a member of any religious order is violative of civil wrong. This is the letter and spirit of Explanation I to section 9. In American Jurisprudence, Vol. 66, para 45, the law is explained thus:

"The (the) civil courts have steadily asserted their want of jurisdiction to hear and determine any controversy relating thereto. On the other hand, the civil courts have without hesitation exercised their jurisdiction to protect the temporalities of such bodies, for whenever rights of property are invaded, the law must interpose equally in those instances where the dispute is as to

church property and in those where it is not."

43. In reading Section 9 widely and construing it expansively the jurisdiction to entertain a suit for declaration whether the church was episcopal or congregational and whether the appellants could have been ordained by the Patriarch when it was contrary to the earlier decision given by this Court that the ordination was required to be approved by Synod, the Court is not being asked to adjudicate on faith but whether the exercise of right in respect of faith was valid. The Grace no doubt comes from Patriarch and on that there is no dispute but whether the Grace came in accordance with the Canon or the Constitution is certainly a matter which would fall within Section 9 CPC. Status and office are no doubt different but what was challenged is not the status or faith in Patriarch but the exercise of right by Patriarch which interfered with the Office of Catholico held validly......."

26. Applying the principle laid down by the Supreme Court in the above referred to judgment to the facts of the present case, it is held that the present suit which seeks to protect the Joint Pithadhishwarship of the Sixth Gadi which the plaintiff acquired upon the heavenly abode of Vrajratanlalji in 1995 is certainly a suit of civil nature and is maintainable in a civil court. It relates to a religious office to which the emoluments and perquisites such as Gurubhet and Charanbhet are attached. In fact the Courts have decided such disputes in respect of Vallabh Sampraday in the past.

27. In Mohan Lalji's case (supra), the Privy Council was required to decide a claim in respect of the Sebaitship of the temple of Ballavacharya Gosains. The facts in that case were:

The plaintiffs were the sons of a daughter, named Ganga Betiji of Goswami Muttuji Maharaj. The suit was filed in the year 1904 claiming joint possession of the temple and appurtenances situated in Jatipura, Muttra District belonging to the Ballavaharya Gosains. The Privy Council was required to decide whether the grandson through the daughter was entitled to joint exercise of right of Shbaitship in a temple. The Privy Council came to the conclusion that in the

Vallabh Sampraday a daughter was never married in the Vallabh Kul and therefore the sons of daughter are not entitled to Sebaitship in the Vallabh Sampraday. This judgment establishes two things that

(i) right to Shebaitship in the Vallabh Sampraday is a matter which can be decided by the Court and is not merely a religious matter but a matter of civil nature and

(i) even in Vallabh Sampraday the post of the Tilkayat is in the nature of the Shebait.

28. There is no manner of doubt that post of Pithadhipati in Vallabh Sampraday is similar to that of a Shebait or a Mahant and the distinction sought to be drawn between the Pith of a Vaishnav Guru or Maharaj and a Mahant of a Math or Shebait of a temple by Mr. Vakil, learned senior counsel for the defendants has no substance which can be proved by the following two decisions:

(I)(i) In Nanabhai's case (supra), a Division Bench of the Bombay High Court has observed in respect of the Gadi of Tilkayat Maharaj at Nathdwara as follows:

"It is established and indeed was never denied that the plaintiff as the Tilkayat Maharaj by right of primogeniture obtaining in his family for generations past was in possession of the idol of Shrinathji belonging to the family and inherited from his ancestors Vithalnathji with all the property dedicated to the idol till 8th May 1876."

The High Court has further quoted the argument of defendant No.5 who was appointed as the Tilkayat of Nathdwara by the Rana of Udaipur after deposing Goswami Girdharji from the said post. "He urged that the Rana of Udaipur had deposed the plaintiff from the Gadi of Tilkayat Maharaj and deported him from his territory that he himself had been placed on such Gadi by the Rana in 1876 and that therefore he was entitled to possess and manage all the property belonging to the idol" (emphasis supplied).

(ii) Taking either alternatives into consideration, i.e., that the person holding the post of Tilkayat owns and possesses the idol and the properties dedicated to it or is the trustee, his interest in the idol and the

properties dedicated to it are of a proprietary nature and not merely a status or a character as sought to be contended.

(II)(i) In yet another judgment of the Bombay High Court in Shriman Goswami Shri 109 Shri Govardhanlalji's case (supra), the Bombay High Court was called upon to decide the rights between the father and the son, namely, the deposed priest and the new priest in respect of the firm established in Bombay to facilitate the collection of offerings and employment of the funds belonging to the shrine under the name of Navnitdas Purshottamdas. In the said judgment it is stated as follows:

> "In this case the plaintiff who is now seventeen years of age alleges that he is the high priest of the shrine of Shrinathji at Nathdwara and as such claims to be entitled to all the property dedicated to the shrine..... The defendant is the father of the plaintiff and until the year 1876 he has been upon the Gadi as high priest of the shrine and the manager of all its property".

(ii) The certificate of Colonel Ipimpey the political agent at Meywar reads as under:

> "This is to certify that Girdharilalji was deposed from the office of the high priest of Nathdwara shrine in Meywar by order of the political agent and the Darbar on the 8th day of May 1876 and was deported from Nathdwara and that Govardhanlal son of said Girdharilalji was placed on the Gadi of said Nathdwara as the high priest of the shrine to enjoy all revenue and emoluments pertaining thereto in the room of his father, the said Maharaja Gosayee and is now the Maharaja of Nathdwara".

29. The aforesaid observations clearly establish that the person holding the Gadi is certainly a manager of the property and is entitled to the revenue and emoluments pertaining to the Gadi.

30. Both the aforesaid judgments were delivered before the Firman of the Rana of Udaipur by which the Shrinathji temple was declared as a public property and have therefore applicability to the dispute arising herein.

31. Mr. Vakil, learned Senior counsel strenuously contended that the judgment in Most Rev. P.M.A.

Metropolitan's case (supra) relied upon by Mr. Thakore, learned senior counsel for the plaintiff to establish that civil suit is maintainable in view of Explanation II to section 9 of the Code cannot be made applicable as against the judgment referred to by him in the case of Sinha Ramanuja (supra) because according to Mr. Vakil, learned senior counsel, the judgment in Shri Sinha Ramanuja's case (supra), decision is rendered by Four Judge Bench of the Supreme Court whereas in Most Rev. P.M.A. Metropolitan's case (supra) judgment is delivered by Three Judge Bench of the Supreme court. Besides this, the observations which are made with respect to maintainability of civil suit in view of the provisions of Section 9 of the Code is made by only One Judge, that is, Justice R.M. Sahai whereas other two Judges have not expressed any opinion in the said judgment with regard to section 9 of the Code. Therefore, according to Mr. Vakil, the ratio laid down by the Supreme Court in Shri Sinha Ramanuja's case (supra) still holds the field and in view of the ratio laid down by the Supreme Court in the said judgment again he reiterated that the present suit is not maintainable.

32. In light of the aforesaid contentions, now let us examine what is the ratio laid down by the Supreme Court in Shri Sinha Ramanuja's case (supra) relied upon by Mr. Vakil. In the said case the Supreme Court has ultimately on final analysis observed as under:

> "The principles of law deducible from decided cases pertaining to the maintainability of suits in Civil Courts in respect of honours in temples may be summarized as follows: (1) A suit for a declaration of religious honours and privileges simpliciter will not lie in a civil court, (2) But a suit to establish one's right to an office in a temple and to honours and privileges attached to the said office as its remuneration or perquisites, is maintainable in a civil court, (3) The essential condition for the existence of an office is that the holder of the alleged office shall be under a legal obligation to discharge the duties attached to the said office and for the nonobservance of which he may be visited with penalties, (4) So judged, there cannot be an independent office of theerthakar, for a theerthakar has no obligatory duties to perform; nor can there be an office of arulipad; the said word only connotes that the names of the theerthakars are called out by the archaka in a certain order, (5) Even if theertham is given or

> other honours are shown in a particular order to a person holding an office, it does not necessarily follow that the said honours are part of the remuneration attached to the office; but it is a question of fact to be ascertained on the evidence whether the said honours are attached to the office as part of its perquisites in the sense that they have become an integral part of the ritual to be performed by the recipient as the office-holder or are only shown to him as a mark of respect on the occasion of his visit to the temple."

33. Applying the principles as laid down in the aforesaid judgment to the facts of this case, at the cost of repetition, be it stated that this Court has observed in earlier paragraphs of this judgment that if the Nidhi Swaroop itself is not considered as property, then all the properties are deemed to be associated with the Nidhi Swaroop while the post of a Pithadhipati is a religious office performing certain duties to the Nidhi Swaroop and the post is akin to the post of a Mahant or Shabait. As observed in earlier paragraphs of this judgment, the post of Pithadhipati is an office and not merely a religious character or status. It is also observed that the office of Pithadhipati is offered Charanbhet and Gurubhet which are clearly attached to the office by quoting two instances with respect to the Nathdwara temple. From the judgment in Tilkayat Shri Govindlalji's case (supra) it is clear that Pithadhipati has to perform certain duties attached to the said office and nonobservance of the duties as Pithadhipati can be visited with penalties and therefore it is deduced by me that the judgment in Shri Sinha Ramanuja's case (supra) relied upon by Mr. Vakil is fully complied with and therefore civil suit is maintainable.

34. It may again be required to be noted that the judgment in Shri Sinha Ramanuja's case (supra) relied upon by Mr. Vakil is prior to the Amendment Act of 1976 whereas the judgment in the case of Most Rev. P.M.A. (supra) relied upon by Mr. Thakore is delivered after the Amendment Act of 1976 came into effect.

35. It is true that the judgment in the case of Most Rev. P.M.A. (supra) is delivered by a Three Judge Bench of the Supreme Court out of which two Judges have not expressed their opinion about applicability of section 9 whereas only Justice R.M. Sahai has made observations with regard to the provisions of Section 9 of the Code by giving separate judgment wherein in paras 28, 29, 30, 33,

38 and 43 the Court has observed how civil suit is maintainable to which reference is made in earlier paragraphs of this judgment.

36. It is equally true that two other Honourable Judges of the Bench have not expressed any opinion on the question of maintainability of civil suit in view of the provisions of section 9 of the Code as in their view so far as the provisions of 9 are concerned they were not urged before the Appellate Judge before the Division Bench and therefore deemed to have abandoned. Therefore, according to me, it does not mean that two Honourable Judges of the Supreme Court have taken a dissenting view than the view taken by Honourable Mr. Justice R.M. Sahai. The observations made by Honourable Mr. Justice R.M. Sahai with regard to maintainability of the suit in view of the provisions of section 9 of the Code are very weighty and they are more relevant to the facts of the present case as the said view is expressed after the Amendment Act of 1976 came into existence. Therefore the said observations of Honourable Mr. Justice R.M. Sahai can certainly be invoked in this case even if they are considered as obiter dicta.

37. It is settled principle of law that when the other Judges of the Bench do not express any contrary view or dissenting view than the view expressed by other Judge of the Bench, it is presumed that the Judges who have not expressed contrary to descending view have agreed with the view expressed by the other Judge. In this connection, Mr. Mihir Thakore, learned senior counsel for the plaintiff, has placed reliance on the judgment of the Queen's Bench Division, in the case of the Guardians of the poor of the West Derby Union v. The Guardians of the Poor of the Atcham Union, reported in XXIV Queen's Bench Division, 117. In the said case, delivering the judgment Lord Esher, M.R. observed as under:

> "The question is, what is the true construction of the 35th section of the Act of Parliament which is before us, and, when we have got at the true construction, what is the application of it to this case? With regard to the construction of this section, a great many Courts have considered it, and a great many judges have had different opinions about it. That being so, this Court expressed a hope, as we were told that several cases were going to the House of Lords, that the House of Lords would construe the whole section, so that we might know what their view of the true

construction was. The House of Lords heard the cases, and did not give judgment at once, but considered the matter carefully, and four of the learned judges in the House of Lords gave judgment. Now we know that each of them considers the matter separately, and they then consider the matter jointly, interchanging their judgments, so that every one of them has seen the judgments of the others. If they mean to differ in their view, they say so openly when they come to deliver their judgments, and if they do not do this, it must be taken that each of them agrees with the judgments of the others."

38. In this connection, it also would be profitable to refer to the guidelines delineated by a Full Bench of the Bombay High Court in the case of State of Bombay v. Chhaganlal Gangaram Lavar, AIR 1955 Bom.1, wherein Chief Justice Chagla speaking for the Full Bench had said thus:

"So long as the Supreme Court does not take a different view from the view taken by the Privy Council, the decisions of the Privy Council are still binding upon us, and when we say that the decisions of the Privy Council are binding upon us, what is binding is not merely the point actually decided but an opinion expressed by the Privy Council, which opinion is expressed after careful consideration of all the arguments and which is deliberately and advisedly given."

39. Applying the guidelines delineated by a Full Bench of the Bombay High Court in the above referred to judgment which is applicable to this Court also as it is delivered prior to 1960, that is, before formation of this High Court, it can be said that the Supreme Court is akin to Privy Council after independence and therefore even opinion expressed by one Honourable Judge of a Three Judge Bench, if other two judges have not taken any contrary opinion, is binding to this Court.

40. Therefore the end product of the aforesaid discussion goes to establish that the right which the plaintiff seeks to establish with respect to joint Pithadhishwar of the sixth Gadi of Surat is a dispute of civil nature within the meaning and definition of Section 9 of the Code and therefore civil suit in civil court is maintainable.

41. Now the next question which falls for determination is as to whether the rule of Primogeniture

is applicable to the 6th Gadi Nidhi Swaroop at Surat as canvassed by Mr. S.B. Vakil, learned Senior Counsel appearing for the defendants?

42. To answer the aforesaid question, following points which are highlighted from the pleadings of the parties are material for consideration:

(i) From the very inception there was no practice of the Nidhi Swaroop and consequently the Gadi going to the eldest son or the eldest son of the eldest son.

(ii) At the very inception of the Sampraday, it was the younger son of Vallabhacharyaji who became the next Pithadhishwar.

(iii) After Vithalnathji Gusainji, it was not his eldest son, who became the Pithadhishwar in respect of all the nine Nidhi Swaroop (idols), but seven Nidhi Swaroops (idols) were given by Vithalnathji Gusainji during his lifetime to the seven sons and on his heavenly abode, the Nidhi Swaroops of Shrinathji and Navnitpriyaji, by mutual consent, went to Girdharji.

(iv) On the heavenly abode of Girdharji, the Nidhi Swaroop of Shrinathji and Navnitpriyaji went to his eldest son Damodarji and accordingly became the Pradhan Pithadhishwar while the Nidhi Swaroop of Mathuradhish went to the younger son Gopinathji and he accordingly became the Pradhan Pithadhishwar.

(v) These events clearly show that there was not only no custom of the nature pleaded by the defendants but in fact the Pithadhishwarship went to such person(s) on whom the earlier Pithadhishwar bestowed the idol and Rule of Primogeniture is not established by any long and consistent custom.

(vi) Any applicability of such rule in respect of the Pradhan Pith at Nathdwara does not imply such custom in respect of the Shashthapith at Surat.

(vii) In respect of the Shahshtapith at Surat, Vrajratanlalji himself had sought to partition the properties and reached at an understanding whereby the sixth Nidhi Swaroop (idol) would be jointly held by his two sons, Govindraiji and

Madhusudanlalji, unless another Nidhi Swaroop (idol) was consecrated.

(viii) Vrajratanlalji by will has conferred the Nidhi Swaroop of Balkrishnalalji of the Shashthapith jointly to the three grandsons alongwith joint rights of seva.

(ix) Balkrishnalalji accepted the will and from 1995 till 2000 Balkrishnalalji, Kalyanraiji and Vallabhraiji are jointly Shashthapithadhipatis.

43. The above mentioned events and circumstances go to establish that the defendants' claim of applicability of rule of Primogeniture by custom is ex-facie untenable.

44. Though rule of Primogeniture is not applicable to all the Piths of Vallabh Sampraday including Pradhan Pith, even then if we assume without admitting that rule of Primogeniture is applicable by custom, such custom stands abolished in view of section 4 (1) of the Hindu Succession Act, 1956 which reads as under:

"4. Overriding effect of Act.-- (1) Save as otherwise expressly provided in this Act, --

(a) any text, rule or interpretation of Hindu law or any custom or usage as part of that law in force immediately before the commencement of this Act shall cease to have effect with respect to any matter for which provision is made in this Act;

(b) any other law in fore immediately before the commencement of this Act shall cease to apply to Hindus in so far as it is inconsistent with any of the provisions contained in this Act."

45. Therefore, the contention that rule of Primogeniture in Vallabh Sampraday is not abolished by section 4 (1) of the Hindu Succession Act since the position of the Pithadhipati is a religious status and character and not property is not tenable.

46. At the risk of repetition, it is important to appreciate that as per Vallabh Sampraday, the Nidhi Swaroop of Krishna is considered as property. The different Nidhi swaroops are owned by the Pithadhipati of the respective Gadis. As and when the Nidhi Swaroop is bestowed on any one, such person becomes the owner of the Nidhi Swaroop and consequently becomes the Pithadhipati and the Tilkayat of the concerned house. This is evident from the letter of 1916 addressed by the Goswamis etc.

of Kota wherein the principle that a person becomes the Tilkayat when the Nidhi Swaroop is bestowed on him is clearly spelt out. Since Nidhi Swaroop itself is property, it is inheritable as property, singly or jointly, and can also be partitioned. This is evident from the observations of the Division Bench of the Allahabad High Court in Gopal Lalji's case (supra) to which reference is made earlier which was concerned with the religious office in the Vallabh Sampraday.

47. The argument that the rule of Primogeniture would be applicable because (1) the religious office of Pithadhishwar is a status and a character and (2) the Nidhi Swaroop (idol) cannot be partitioned, is not tenable for the simple reason that the Nidhi Swaroop (idol) itself is considered a property which is not impartible and consequently the religious office of Pithadhishwar which is attached to the Nidhi Swaroop also can be held jointly.

48. Considering the above, since the religious office of Pithadhishwar goes with the worship of the Nidhi Swaroop, it is not possible to bifurcate between the two as is sought to be done by the defendants. The religious office of Pithadhipati goes with the passing of title in the Nidhi Swaroop which itself is property and the properties associated with it. To describe the religious office of Pithadhipati as merely a character or a status unconnected with the property in the Nidhi Swaroop is, therefore, inappropriate and incorrect.

49. The position of the Sixth Gadi at Surat is quite distinct from the position of the Tilkayat at Nathdwara.

(a) In case of the Shrinathji temple at Nathdwara, the Rana of Udaipur, who was an absolute monarch and in whom vested, all the legislative, judicial and executive powers of the State, issued a Firman on 31.12.1934. The said Firman completely changed the position of the Tilkayat Maharaj of Shrinathji Temple. By the Firman it was laid down that the shrine of Shrinathji had always been and was a religious institution for the followers of the Vaishnava Sampraday and all the properties offered at the shrine were the properties of the shrine and the Tilkayat Maharaj was merely a custodian, manager and trustee of the said property of the shrine. It also provided that the Udaipur darbar had absolute right to supervise that the property dedicated to the shrine is used for legitimate purpose of the

shrine. In the question of succession, the said Firman provided that the law of Udaipur had always been and is that the succession to the Gadi of Tilkayat is regulated by the law of primogeniture and that Udaipur darbar has the absolute right to depose any Tilkayat or disqualify any person who would have otherwise succeeded to the Gadi. The Firman also provided that if the Tilkayat Maharaj is a minor, the darbar always had and has absolute authority to take any measures for the management of the shrine. Holding the Firman to be law, the Supreme Court in Tilkayat Shri Govindlalji's case (supra) while upholding the validity of Nathdwara Temple Act, 1959 has observed that the Firman concludes the controversy between the parties and shows that the Shrinathji Temple at Nathdwara is a public temple.

50. Having come to the conclusion that the Nathdwara temple was a public temple and all offerings vest in shrine, the Supreme Court observed that the position of the Tilkayat Maharaj of Shrinathji Temple at Nathdwara was of merely a custodian, manager and the trustee of the property of the shrine of Shrinathji. The Supreme Court observed as under:

"Having regard to the unambiguous and emphatic words used in clause 1 of the Firman and having regard to other drastic provision contained in its remaining clauses, we are inclined to think that this Firman made the Tilkayat for the time being a custodian, manager and trustee and nothing more. As a custodian or manager he has right to manage the properties of the temple subject of course to the overall supervision of the darbar, the right of the darbar in that behalf being absolute. He was also a trustee of the said property and the word 'trustee' in the context must mean trustee in the technical legal sense. In other words, it is not open to the Tilkayat to claim that he has rights of a Mahant or a Shebait, his rights are now defined and he cannot claim any higher rights after the Firman was issued."(emphasis supplied)

51. Having taken this view in light of the Firman of the Rana of Udaipur, the Supreme Court observed that the position of the Tilkayat Maharaj of Shrinathji Temple at Nathdwara cannot be compared to that of a Mahant or a Shebait for under Hindu Law Shebaits and Mahants who

mange the properties of the idols and Maths are recognized to possess certain rights and to claim certain status. The position of the Mahant under Hindu Law is not strictly that of a trustee and is given a right to part of the usufruct.

52. In the case of Sixth Gadi at Surat, there is no Firman of the Maharana of Udaipur which would restrict the right of the Pithadhipati or the Tilkayat to a custodian, manager or trustee. His position is similar to the position of the Tilkayat of Nathdwara as described in the earlier Bombay decisions. The Pithadhipati not only owns and possesses the idol but all properties associated to the idol and has interest in the usufruct. His position is of absolute owner of the temple, idol and properties associated with it. In fact it is not disputed by the defendants that all the properties of Vrajratanlalji would devolve under the will equally upon the three grandsons and these properties are attached to the idol and both idol and the properties associated with it have to devolve as properties under the will of Vrajratanlalji.

53. Seen in the above context, now it can be deduced that from the very inception there was no practice of the Nidhi Swaroop and consequently the Gadi going to the eldest son or the eldest son of the eldest son, meaning thereby, rule of Primogeniture was not applicable from the inception. Of course, by virtue of Firman, the rule was made applicable to the Shrinathji temple at Nathdwara but such rule was not made applicable to any other pith. Hence the contention advanced on behalf of the defendants that rule of Primogeniture is applicable and therefore late Shri Dadaji had no right to make will or partition deed, has no substance as it is without substratum.

54. In this connection, it would be appropriate to refer to the will executed by Vrajratanlalji Maharaj, the grandfather of the plaintiff on 25.11.1986 which is accepted by the defendants in their reply when they contend that the same would apply to the properties. In view of the fact that the idol and/or the office of the Pithadhipati are properties, the will would equally apply to the shrine and the contrary contention, in the circumstances, is not tenable.

55. The contention that idol was already bestowed on the plaintiff's father Govindraiji and, therefore, Vrajratanlalji did not have any right to bestow the idol is ex-facie untenable in view of the fact that at no point of item Vrajratanlalji Maharaj ceased to be the

Pithadhipati till his heavenly abode and a person who does not own the idol cannot be a Pithadhipati. If Vrajratanlalji had bestowed the idol during his lifetime to Govindraiji before the heavenly abode of Vrajratanlalji, Govindraiji would have become the Pithadhipati which has never happened.

56. Assuming that the idol was bestowed on Govindraiji, even then under section 8 of the Hindu Succession Act, 1956 all the three brothers are heirs of Class I and on his heavenly abode would become the owners of the idol and consequently the Pithadhipati.

57. It has come in evidence that joint Pithadhishwarship during the life time of Balkrishnalalji, the eldest brother of the plaintiff has been accepted. Admittedly, on heavenly abode of Vrajratanlalji, all the properties were mutated in the names of the three brothers jointly, including the Haveli where the Sixth Nidhi Swaroop resides and the eldest brother in a document dated 8.2.1997 signed by him has clearly admitted that after the heavenly abode of Vrajratanlalji Maharaj, the Sixth Gadi is jointly owned by Shri Balkrishnalalji, i.e., himself and his two younger brother, i.e., Shri Kalyanraiji and Shri Vallabhraiji. This is further established by the fact that the board in the photograph Ex. 87/8 clearly discloses the three brothers as joint Pithadhishwars (owners) of the sixth Gadi. The plaintiff, therefore, was the Joint Pithadhishwar of the sixth Gadi and jointly owned the idol from 1995 till the heavenly abode of Balkrishnalalji. It was only thereafter that the defendants started obstructing the plaintiff and hence the suit was required to be filed which was filed within two and half months of heavenly abode of Balkrishnalalji.

58. The contention that any dispute as to the right to succession to Gadi or Pithadhipatiship is to be decided by the Pithadhipati of the Pradhan Pith has also no substance. Mr. Vakil, learned Senior Counsel for the defendants, referring to the letter dated 31.1.2001 written by Pithadhipati of Pradhanpith to accept the seva from Sixth house of Surat only in the name of Gopeshraiji and not in any others name and to issue receipt accordingly tried to assert that thereby Gopeshraiji has been accepted as sole Pithadhishwar of Sixth Gadi of Vallabh Sampraday situated at Surat. In this connection, it would be appropriate to refer to the reply affidavit filed by plaintiff. The averments made in para 13 (2) of the reply affidavit filed by the plaintiff have remained uncontroverted by the defendants wherein inter alia it is

stated that none of the seven piths which are established by Shri Vithalnathji Gusainji are in any manner under the control or subservient to the Pradhan Pithadhipati. They are independent idols and Gadis without any control inter-se between them. None of the seven Pithadhipatis or their family members are required to take any permission of any nature whatsoever of the Tilkait Maharaj/Pithadhishwar of Shrinathji Temple with respect to their own Gadis and the sevas performed thereat. The only role which the Pithadhishwar of Shrinathji has to perform is to see that when all or any of the Pithadhishwars of the seven idols come to visit the idol of Shrinathji, appropriate arrangement according to their dignity and as provided by Shri Vithalnathji Gusainji is made. Thus it is clear that the Tilkait Maharaj of Shrinathji has no right whatsoever to interfere in any of the internal matters of any of the Gadis. The right to bestow the idol, Gadis and the properties attached therewith lies with the last Pithadhiswhar Shri Vrajratanlalji Maharaj and he had bestowed them on his three grandsons, namely, Shri Balkrishnalalji, Shri Kalyanraiji and the plaintiff. Nathdwara Goswami Tilkait Shri Rakesh Maharajji has absolutely no right to interfere with the bestowment of the idol by the Pithadhishwar Shri Vrajratanlalji Maharaj and his order dated 31.1.2001 purporting to accept seva from the sixth Gadi of Surat only in the name of Gopeshraiji and not in the name of Pithadhishwars of the sixth Gadi amounts to interference with the Shashtapitha and is void ab initio. Such order cannot result in acceptance of defendant No.2 as the sole Pithadhishwar. The said order passed by the Tilakit Shri Rakeshji Maharaj is in respect of the receipts to be issued for the Bhet received from the Shastha Pith of Surat. It has absolutely no relevance as to the bestowment of rights by Shri Vrajratanlalji to the idol of Balkrishnaprabhuji i.e., the Sixth Gadi of Yadunathji. In fact after the heavenly abode of Shri Vrajratanlalji in 1995, the Bhet was sent by the Pithadhishwars, namely, Shri Balkrsihnalalji Maharaj, Shri Kalyanraiji Maharaj and the plaintiff and the receipts issued were in the name of Shri Balkrsihnaprabhu Surat Ke Ghar Sun or Shri Balkrishnaprabhu Ke Shashtha Pith Ke Ghar Sun Surat. The purported order is clearly a mischievous act on the part of the defendants only with a view to mislead the Court. That the so-called order cannot in any manner affect the rights of the plaintiff. In fact, the legal rights of the plaintiff and the orders of the Court have to be obeyed by the Tilakit of Shrinathji and by other Pithadhishwars.

59. In view of the aforesaid assertion made in the

reply affidavit by the plaintiff which has remained uncontroverted, it can be deduced that Pradhanpith has been following the rule of convenience and favouritism as against the rule of practice, usage, convention, custom and tradition and, therefore, the said letter dated 31.1.2001 is without authority and jurisdiction which cannot be relied upon to hold that any dispute as to the right to succession to Gadi or Pithadhipatiship is to be decided by the Pithadhipati of the Pradhan Pith.

60. So far as the prima facie case, balance of convenience and irreparable injuries are concerned, in view of the foregoing discussion, I am of the opinion that the plaintiff has successfully established prima facie case in his favour. Balance of convenience also tilts in his favour and injunction as prayed for is not granted it would cause irreparable injury to the plaintiff which cannot be compensated in terms of money as the plaintiff would be debarred from exercising his right of joint Pithadhishwar of the Sixth Gadi of Balkrishnaprabhu at Surat.

61. The ratio laid down in the case of S.M. Dychem Ltd. v. Cadbury (India) Limited, (2000) 5 SCC 573 and Colgate Palmolive (India) Limited v. Hindustan Lever Limited (1999) 7 SCC 1, to which heavy reliance is placed by Mr. S.B. Vakil, learned Senior Counsel for the defendants, on the contrary goes against the defendants as the concept of prima facie case must be seen with a view to see who has stronger case and who has better chances of success in the case. Obviously, in the instant case, the plaintiff has a stronger prima facie case and better chance of success in the suit as compared to that of the defendants.

62. Lastly it takes me to the contention as to whether the petition filed under Article 227 of the Constitution can be entertained in view of the concurrent finding of fact arrived at by both the Courts below and in view of the amended provisions of Section 115 of the Code.

63. It is settled principle of law that concurrent finding of facts recorded by both the courts below cannot be assailed in a petition filed under Article 227 of the Constitution of India since the powers vested in Court under Article 227 of the Constitution of India is a supervisory jurisdiction. The High Court must confine itself to the correcting of error of jurisdiction committed by the courts below and it cannot assume suo motu jurisdiction of appellate court and correct every

mistake assumed to have been committed by the courts below. It is a review of the decision making process and not the decision itself. The High Court cannot reappreciate preliminary or perceptive facts found by the fact finding authority under the statute. The aforesaid proposition of law is laid down by the Apex court in Moh. Yunus's case (supra) and (i) Khanna Improvement Trust v. Land Acquisition Tribunal and others (1995) 2 SCC 557, (ii) H.B. Gandhi v. M/s. Gopinath (1992) Supp. 2 SCC 312 and State of Maharashtra v. Milind and others, (2000) 1 SCC 4.

64. Mr. Vakil, learned senior counsel appearing for the defendants, to canvass his contention that petition filed under Article 227 of the Constitution can be entertained, has relied upon the judgment of the Supreme Court in Achutananda Baidya's case (supra) wherein the Supreme Court has observed as under:

> "The power of superintendence of the High Court under Article 227 is not confined to administrative superintendence only but such power includes within its sweep the power of judicial review. The power and duty of the High Court under Article 227 is essentially to ensure that the courts and tribunals, inferior to High Court, have done what they were required to do. The High Court can interfere under Article 227 in cases of erroneous assumption or acting beyond its jurisdiction, refusal to exercise jurisdiction, error of law apparent on record as distinguished from a mere mistake of law, arbitrary or capricious exercise of authority or discretion, a patent error in procedure, arriving at a finding which is perverse or based on no material, or resulting in manifest injustice. As regards finding of fact of the inferior court, the High Court should not quash the judgment of the subordinate court merely on the ground that its finding of fact was erroneous but it will be open to the High Court in exercise of the powers under Article 227 to interfere with the finding of fact if the subordinate court came to the conclusion without any evidence or upon manifest misreading of the evidence thereby indulging in improper exercise of jurisdiction or if its conclusions are perverse. If the evidence on record in respect of a question of fact is not at all taken into consideration and without reference to such evidence, the finding of fact is arrived at by inferior court or tribunal, such

finding must be held to be perverse and lacking in factual basis. In such circumstances, in exercise of the jurisdiction under Article 227, the High Court will be competent to quash such perverse finding of fact. The High Court, in such circumstances, will be competent to consider the validity of the finding of fact assailed before it with reference to materials on record. In this case, the High Court has rightly held that the appellate authority came to the finding of nonexistence of oral agreement of reconveyance without considering the evidence on record."

65. Applying the principles laid down by the Supreme Court in the above referred to judgment to the facts of the present case, at the cost of repetition, be it stated that the ultimate conclusion arrived at by the learned 2nd Extra Assistant Judge, Surat cannot be called as erroneous assumption or acting beyond its jurisdiction, refusal to exercise jurisdiction, error of law apparent on record as distinguished from a mere mistake of law, arbitrary or capricious exercise of authority or discretion, a patent error in procedure, arriving a finding which is perverse or based on no material, or resulting in manifest injustice. On the contrary, in the foregoing paragraphs I have deduced that the learned trial Judge has considered all the documents and ultimately reached to the conclusion that civil court has jurisdiction to decide the case, rule of Primogeniture is not applicable and by virtue of the will the plaintiff has become the Pithadhipati of sixth Gadi at Surat and therefore there is a prima facie case in favour of the plaintiff and balance of convenience also tilts in his favour and irreparable injury would be caused to him if injunction as prayed for is not granted. The said finding is also confirmed by the learned 2nd Extra Assistant Judge in his detailed exhaustive judgment and order which runs to 37 pages wherein the learned lower appellate Judge has considered all the aspects including the maintainability of civil suit under section 9 of the Code, rule of primogeniture, Will, Codicil and partition deed and he has also reached to the same conclusion that the plaintiff is the Pithadhipati of sixth Pith of Surat and therefore both the courts below have unequivocally held hat there is prima facie case in favour of the plaintiff as well as balance of convenience tilts in his favour and if injunction as preyed for is not granted, irreparable injury would be caused to him.

66. Lastly, it would be appropriate to refer to the latest judgment of the Supreme Court with respect to the

power of the High Court under Article 227 of the Constitution in the case of Ouseph Mathai v. M. Abdul Khadir, (2002) 1 SCC 319 wherein the Supreme Court has held that mere wrong decision is not a ground for exercise of jurisdiction under Article 227 of the Constitution. High Court may intervene under Article 227 not wherein it is established that lower court or tribunal has been guilty of grave dereliction of duty and flagrant abuse of powers which has resulted into grave injustice to any party. It is further held therein that the petitioner cannot invoke the jurisdiction under Article 227 as a matter of right and petition under Article 227 cannot be treated like extension of a statutory appeal or revision.

67. Applying the said principles to the facts of the present case, it cannot be said that lower courts are guilty of grave dereliction of duty or committed flagrant abuse of power which has resulted into grave injustice to any party. On the contrary, by the impugned order, equity is tilted in favour of the plaintiff as there is ample evidence to show that he is joint Pithadhishwar of sixth Gadi of Balkrishnaprabhuji at Surat.

68. It is also required to be noted that by virtue of the amendment made in the Civil Procedure Code vide amended Act 1999, proviso is added to Section 115 which in terms provides that "the High Court shall not, under this Section, vary or reverse any order made, or any order deciding an issue, in the course of a suit or other proceeding, except where the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceedings". By virtue of the aforesaid provision, power vested under Section 115 of the Code is circumscribed, therefore, what cannot be granted under Section 115 can never be granted in a petition filed under Article 227 of the Constitution. When the legislature has already provided to put restriction upon the revisional jurisdiction envisaged under Section 115 of the Code of Civil Procedure, I am afraid that same exercise can be undertaken in exercise of power under Article 227 of the Constitution of India. It is well settled that the thing which cannot be allowed to be done directly, cannot be done indirectly.

69. Seen in the above context, I am of the opinion that there is no valid reason or justifiable ground to interfere with the impugned judgment and order. On the contrary, the said judgment and order requires reaffirmation by this Court and hence the petition

deserves to be rejected at the inception.

70. For the foregoing reasons, the petition fails and accordingly it is rejected at the threshold with no order as to costs.

(A.M. Kapadia, J.)

71. At this stage, Mr. S.B. Vakil, learned Senior Counsel for the defendants urged that the implementation and operation of this judgment may be stayed for a period of at least six weeks to enable the defendants to approach higher forum in view of the fact that while entertaining this petition this Court had directed the parties to maintain status quo as existed on the date of filing of the suit till decision of this petition.

72. Mr. Mihir Thakore, learned senior counsel for the plaintiff vehemently opposed the prayer made by Mr. Vakil as according to him, ad-interim relief is operating in favour of the plaintiff from the date of institution of the suit which has remained operative till today and that this Court has reaffirmed the order passed by the learned 2nd Extra Assistant Judge, Surat, and, therefore, there is no question of staying the implementation and operation of this judgment.

73. I have considered the rival submissions advanced by the learned counsel appearing for both the parties and also perused the record of the case.

74. It is true that on the day when the plaintiff instituted the suit, he had moved an application Ex.5 wherein ex-parte ad-interim injunction was granted in his favour which had remained operative till decision of Ex.5. However, application Ex.5 came to be rejected and thereby ex-parte ad-interim injunction granted earlier was vacated on technical ground of nonobservance of mandatory provisions contained in Order 39 Rule 3 of the Code. However, the learned Judge has continued the ad-interim injunction granted in favour of the plaintiff to enable him to prefer Civil Misc. Appeal before the District Court. The learned 2nd Extra Assistant Judge also while admitting the appeal directed the parties to maintain status quo during the pendency of he appeal as on the date of institution of the suit and also initial order passed below application Ex.5 in lower court, and thereafter the learned 2nd Extra Assistant Judge decided the appeal in favour of the plaintiff, meaning thereby, interim injunction is granted in favour of the plaintiff during the pendency of the suit. While entertaining this petition this Court also directed the parties to maintain

status quo and today this Court has rejected the petition. In sum and substance, the ad-interim relief as prayed for in Ex.5 has remained operative in favour of the plaintiff from the date of institution of the suit and this Court has confirmed the finding recorded by the learned 2nd Extra Assistant Judge, Surat.

75. In view of the aforesaid state of affairs, I do not see any valid reason or justifiable ground to stay the operation and implementation of this judgment as claimed by Mr. S.B. Vakil and hence the prayer made by him is rejected.

(A.M. Kapadia, J.)

(karan)